SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BERNSTEIN LIEBHARD LLP, Plaintiff, v. SENTINEL INSURANCE COMPANY, LIMITED, Defendant.	Index No.: 652726/2015 Honorable Andrea Masley

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S POST-FINAL JUDGMENT MOTION FOR LEAVE TO AMEND THE COMPLAINT

Attorneys for Defendant
Sentinel Insurance Company, Limited
Gerald P. Dwyer, Jr.
Wystan M. Ackerman
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Phone: (860) 275-8200
Fax: (860) 275-8299

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

This case is over. The Appellate Division, First Department entered a final judgment granting Defendant Sentinel Insurance Company, Limited's ("Sentinel") motion for summary judgment. *Bernstein Liebhard LLP v Sentinel Ins. Co., Ltd.*, 162 A.D.3d 605, 605, 78 N.Y.S.3d 339, 339 (1st Dep't 2018), *leave to appeal denied*, 2019 NY Slip Op. 63571, 2019 N.Y. LEXIS 239 (N.Y. Feb. 21, 2019)(Dwyer Affirmation Ex. 1). Under controlling First Department authority, this Court may not properly conduct any further proceedings in this case, other than with respect to an award of costs to Sentinel, and potentially an award of attorney's fees to Sentinel with respect to this frivolous motion. The Appellate Division has directed entry of final judgment.

In addition to the case being finally and fully resolved in favor of Sentinel, Plaintiff's motion for leave to amend its complaint fails for three additional reasons. First, under controlling First Department law, leave to amend the complaint may not be granted after summary judgment has been granted to the defendant, because summary judgment is based on the factual basis for the suit, not how it was pled.

Second, the First Department has already denied the same request by Plaintiff, specifically for leave to amend and for a remand. After losing on appeal, Plaintiff requested that the Appellate Division grant it leave to amend its complaint and to remand, predicating that request on the same reasons contained in the instant motion.[1] The Appellate Division denied Plaintiff's request but despite the denial, Plaintiff is now seeking a second (or third) bite at the apple from a court of inferior jurisdiction. It is beyond citation

[1] *Compare* Plaintiff-Respondent's Memorandum of Law in Support of it motion For Leave to Reargue, or Alternatively For Leave to Appeal to the Court of Appeals, p. 13 (contending that "the Court should allow Bernstein to amend its pleading and remand for further proceedings.")(Dwyer Affirmation Ex. 2), *with* Plaintiff Bernstein Liebhard, LLP's Memorandum of Law in Support of its Motion for Leave to Amend its Complaint at passim.

that within a coherent court system, a trial court cannot substitute its own judgment for and overrule an appellate court, particularly on precisely the same matter. Even if the instant case had not been resolved with finality in favor of Sentinel (which it was), the instant motion fails utterly as a transparent attempt to void the ruling of the Appellate Division and manufacture leave to amend and a "do over" on remand where the First Department denied that very relief.[2]

Third, Plaintiff fails to satisfy the standard for such a late motion for leave to amend, providing no reasonable excuse for its long delay, which was caused by its strategic choices not to pursue alternative approaches to its alleged recovery despite numerous opportunities to do so. Permitting a "do over" at this time would greatly prejudice Sentinel. The entire case would need to be re-opened and the expensive discovery, including expert discovery and report drafting, that has already been conducted would be largely if not completely wasted, and would all have to be re-done based on this new theory of recovery.

POINT I: THIS COURT CANNOT PROPERLY CONDUCT ANY FURTHER PROCEEDINGS OTHER THAN THE CLERK'S ENTRY OF THE FINAL JUDGMENT AS DIRECTED BY THE APPELLATE DIVISION, AND AN AWARD OF COSTS TO SENTINEL

"[A] trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith. The judgment or order entered by the lower court on a remittitur must conform strictly to the remittitur, and it cannot afterwards be set aside or modified by the lower court." *Glassman*

[2] Dwyer Affirmation Ex. 3. (order denying reargument and leave to appeal to Court of Appeals).

v. ProHealth Ambulatory Surgery Ctr., Inc., 96 A.D.3d 799, 800, 946 N.Y.S.2d 602, 604 (2d Dep't 2012) (holding that trial court could not grant leave to amend answer where not expressly provided for in appellate decision) (citations omitted). "Trial courts are without authority to vacate or modify orders of the Appellate Division . . . ." *Maracina v. Schirrmeister*, 152 A.D.2d 502, 503, 544 N.Y.S.2d 13, 14 (1st Dep't 1989); *see also Wiener v. Wiener*, 10 A.D.3d 362, 363, 780 N.Y.S.2d 759, 761 (2d Dep't 2004).

As CPLR 5522 explains, "[a] court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment, or order before it, as to any party. The court shall render a final determination or, where necessary or proper, remit to another court for further proceedings." Here, the Appellate Division rendered a final judgment. It did not remit the case to this Court for further proceedings other than the entry of its final judgment. The Appellate Division reversed this Court's order, granted Sentinel's cross-motion for summary judgment, and directed that judgment enter accordingly. *Bernstein Liebhard*, 162 A.D.3d at 605; Dwyer Affirmation, Ex. 1. The law does not permit this Court to do anything other than enter a final judgment as directed by the Appellate Division, award costs to Sentinel, and, if Sentinel chooses to file an appropriate motion, award attorney's fees to Sentinel with respect to this frivolous motion. *See, e.g., Glassman*, 96 A.D.3d at 800; *Maracina*, 152 A.D.2d at 503; *Barton Realty Corp. v. Mangan*, 25 A.D.2d 730, 731, 268 N.Y.S.2d 869, 870 (1st Dep't 1966) (trial court "had no power to change the terms of a remittitur from an appellate court").

Plaintiff repeatedly recognized in its own appellate filings that the Appellate Division's decision brought this case to an end. In its motion to reargue in the Appellate Division, Plaintiff expressly acknowledged that the Appellate Division had "dismissed

Bernstein's complaint without remand," in other words, "dismiss[ed] the claim entirely . . . rather than remand for further proceedings . . . ." Dwyer Affirmation, Ex. 2, at 10-11.

As Plaintiff's own appellate filings recognize, this case has reached finality. Plaintiff's Memorandum of Law in Support of Its Motion For Leave To Amend Its Complaint further acknowledges that "the Appellate Division dismissed Plaintiff's case in its entirety, without remand." NYSCEF Doc. No. 103, at 3. Where the Appellate Division granted final judgment and did not remand the case, the law does not permit this Court to take any further steps other than enter the final judgment as expressly directed by the Appellate Division, and award costs to Sentinel in accordance with the CPLR. *Glassman*, 96 A.D.3d at 800; *Barton Realty*, 25 A.D.2d at 731. Sentinel also reserves the right to seek to recover its attorney's fees for responding to this frivolous motion.

POINT II: LEAVE TO AMEND THE COMPLAINT MAY NOT BE GRANTED AFTER SUMMARY JUDGMENT HAS BEEN GRANTED IN FAVOR OF THE DEFENDANT

Plaintiff's motion for leave to amend also must be denied because the law does not permit the amendment of a complaint after summary judgment has been granted to the defendant. As the First Department has explained, "[a] motion for summary judgment does not direct the court's attention to the sufficiency of the pleading, but rather to the factual basis for the action or defense. Once a court has granted or denied a summary judgment motion based on the facts adduced before it, the matter is res judicata; new life may not be breathed into it through permissive repleading, even upon a showing of merit. The time to demonstrate the merit of an action or defense challenged on a motion for summary judgment is before the motion is decided. The conclusive effect of a judgment on the merits may not be fatally undermined . . . by allowing the party whose cause is dismissed a second

chance to litigate the matter." *Buckley & Co. v. New York*, 121 A.D.2d 933, 505 N.Y.S.2d 140, (1st Dep't 1986) (citations omitted); *see also Amaranth LLC v. National Australia Bank Ltd.*, 40 A.D.3d 279, 280, 835 N.Y.S.2d 177, 178 (1st Dep't 2007) ("Plaintiffs' motion for leave to amend, made subsequent to the grant of summary judgment dismissing the complaint, was properly denied."); *Reznick v. Tanen*, 162 A.D.2d 594, 556 N.Y.S.2d 777 (2d Dep't 1990) ("Having granted summary judgment based on the facts before it, the Supreme Court was without authority to grant the plaintiff leave to replead."); *Engel v. Aponte*, 51 A.D.2d 989, 990, 380 N.Y.S.2d 739, 740 (2d Dep't 1976) ("Until reversed, an order granting summary judgment is as conclusively determinative of all issues in a case as is a judgment after trial.").

None of the cases cited by Plaintiff provide any support for its position that this Court can grant leave to amend the Complaint, or conduct any further proceedings, after a final judgment has been issued by the Appellate Division granting summary judgment to Sentinel without remand. Plaintiff cites *Dittmar Explosives, Inc. v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498, 231 N.E.2d 756, 285 N.Y.S.2d 55 (1967), but there the Court of Appeals granted precisely the opposite of the relief granted by the Appellate Division here. In *Dittmer*, the Court of Appeals reversed a judgment in favor of the defendant and remitted the case to the trial court. *Id.* at 503, 759, 59; *see also DiSario v. Rynston*, 138 A.D.3d 672, 674-75, 30 N.Y.S.3d 129, 133 (2d Dep't 2016) (trial court allowed home remodeling contractor to amend complaint at trial to convert mechanic's lien claim into a quantum meruit claim based on same facts; judgment in favor of the contractor was nevertheless reversed because contractor failed to present supporting evidence); *Rogers v. South Slope Holding Corp.*, 255 A.D.2d 898, 680 N.Y.S.2d 772 (4th Dep't 1998) (motion for leave to amend was filed in trial

court and then appeal was taken from that decision); *Lanpont v. Savvas Cab Corp.*, 244 A.D.2d 208, 209-210, 664 N.Y.S.2d 285, 286-87 (1st Dep't 1997) (defendant sought leave to amend answer at trial to assert worker's compensation as a complete defense, after plaintiff had misrepresented his relationship to the employer); *Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502, 505, 925 N.Y.S.2d 51, 54 (1st Dep't 2011) (after dismissal on the pleadings of an oral contract claim, plaintiff sought leave to amend to plead written contract claim).[3] Plaintiff fails to cite even a single case to support its position. There are none because Plaintiff's position is frivolous and contrary to the legion of controlling appellate authority cited above.

POINT III - THE FIRST DEPARTMENT AND THE COURT OF APPEALS ALREADY REJECTED THIS VERY REQUEST FROM PLAINTIFF.

Plaintiff repeatedly argued in its motion to reargue in the Appellate Division that the Appellate Division should not have "dismiss[ed] Bernstein's claim outright," but rather "should have allowed Bernstein to amend its claim to conform to the new parameters set out in the Appellate Division Order . . . ." Dwyer Affirmation, Ex. 2 at 4 (underlining added). In particular, Plaintiff argued that the Appellate Division "should remand Bernstein's claim to the Supreme Court for further proceedings in line with the Court's direction on the types of damages available under the business interruption coverage." *Id.* at 12. Using the very same language as contained in the instant motion (an apparent "copy and paste") Plaintiff further argued above that "[a]t a minimum, this Court [i.e., the

[3] In *Kocourek*, the case did not reach a final judgment prior to the motion for leave to amend the complaint being filed. The trial court dismissed only two of the four causes of action. *See Kocourek v. Booz Allen Hamilton Inc.*, Index No. 602224/08, slip op. at 2, 7-8 (N.Y. Supreme Court, N.Y. Cty. July 2, 2009) (Dwyer Affirmation, Ex. 6). Plaintiff appealed from the dismissal of the two causes of action, while the other two remained pending in the trial court. *See Kocourek v. Booz Allen Hamilton Inc.*, 71 A.D.3d 511, 900 N.Y.S.2d 1 (1st Dep't 2010).

Appellate Division] should grant Bernstein leave to amend its complaint to more specifically plead the covered damages," and that "the [Appellate Division] should allow Bernstein to amend its pleading and remand for further proceedings." *Id.* at 13; *see also* Plaintiff's Memorandum of Law in Further Support of Its Motion for Leave to Reargue, or Alternatively for Leave to Appeal to the Court of Appeals, Dwyer Affirmation, Ex. 2 at 2, 4, 6, 8 (again seeking remand for further proceedings).

Despite Plaintiff's numerous requests that the Appellate Division modify its final judgment and remand for further proceedings in this Court, the Appellate Division denied Plaintiffs' motion to reargue in its entirety. Dwyer Affirmation, Ex. 3. In denying Plaintiff's motion to reargue, the Appellate Division thereby denied leave to amend the complaint, and declined to modify its decision directing a final judgment in favor of Sentinel, and declined to remand or remit this matter for any further proceedings. *See also Five Towns Nissan, LLC v. Universal Underwriters Ins. Co.*, Index No. 651164/2013, 2016 NY Slip Op 32316(U), ¶ 6 (N.Y. Sup. Ct., N.Y. Cty. Nov. 22, 2016) (explaining that, where Appellate Division "implicitly rejected" argument made on motion to reargue, "the Appellate Division decision granting Tower summary judgment, and its subsequent denial of Five Towns' motion to reargue, is law of the case" binding on the trial court).

Plaintiff then moved for leave to appeal in the Court of Appeals, again acknowledging, on the very first page of its brief, that "under the Appellate Division decision, Bernstein will recover nothing whatever for its business interruption loss." Dwyer Affirmation, Ex. 4, at 1. Plaintiff further explained to the Court of Appeals that "[t]he Appellate Division, incorrectly we submit, denied Bernstein even [a] reduced recovery . . . ." *Id.* at 8 n.2. Bernstein argued that it "should be afforded the opportunity to present its

claim for damages at trial, allowing a jury to determine its lost income." *Id.* at 11. The Court of Appeals denied leave to appeal. Dwyer Affirmation, Ex. 5.

POINT IV: LEAVE TO AMEND SHOULD BE DENIED BASED ON PLAINTIFF'S LACK OF REASONABLE EXCUSE, AND PREJUDICE TO SENTINEL

Plaintiff's motion for leave to amend must be denied for all of the reasons set forth in Points I, II and III above, and there should be no need for this Court to address or apply the applicable legal standard for a motion for leave to amend. If the Court should reach those issues, however, Plaintiff's motion should still be denied.

As an initial matter, Plaintiff incorrectly asserts that the Appellate Division "found there to be coverage under the policy for its loss", despite there being no such finding.[4] The appellate decision merely noted that "theoretically" the plaintiff could have been entitled to coverage if it had not conducted the case as it did. Dwyer Affirmation, Ex. 1 at 60. Any entitlement to coverage remains unproved, theoretical and speculative, and does not supply a basis to amend a pleading, even assuming that the pleading itself were the reason Plaintiff failed to proffer legally viable proof or even to pursue such "a claim in its brief." *Id.* at 60.

In addition, Plaintiff cites a standard for leave to amend that is not applicable here, where the case was on the eve of trial prior to the appellate decision. "Although leave to amend a pleading generally should be freely granted (see, CPLR 3025 [b]), 'that policy does not obtain on the eve of trial. In such case, there is a heavy burden on plaintiff to show extraordinary circumstances to justify amendment by submitting affidavits which set forth

[4] Plaintiff Bernstein Liebhard LLP's Memorandum of Law in Support of Law in Support of Its Motion For Leave To Amend Its Complaint. NYSCEF Doc. No. 103 at 5.

the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay.'" *Jablonski v. Cty. of Erie*, 286 A.D.2d 927, 928, 730 N.Y.S.2d 626, 627-28 (4th Dep't 2001) (quoting *Hemmerick v City of Rochester*, 63 A.D.2d 816, 816, 405 N.Y.S.2d 841, 842 (4th Dep't 1978)). "Judicial discretion to grant an amendment of a pleading should be exercised with caution where a case has been certified as ready for trial," and "[w]here there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay." *Id.* at 928, 628; *see also Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 24, 756 N.Y.S.2d 26, 30 (1st Dep't 2003) (following *Jablonski* and applying same standard); *Panasia Estate, Inc. v. Broche*, 89 A.D.3d 498, 498, 932 N.Y.S.2d 340, 340 (1st Dep't 2011) (leave to amend properly denied where it was sought 18 months into the litigation, "discovery, which had been tailored to the theories of liability set forth in the second amended complaint, was nearly complete and the filing date of the note of issue was imminent").

Plaintiff provides no reasonable excuse for why it did not pursue an alternative theory of this case from the outset, or at a minimum after Sentinel filed its cross-motion for summary judgment, especially where Plaintiff claims that the applicable law was unclear at the time it filed suit. Where the law is unclear, parties must make alternative arguments. For reasons best known to itself, Plaintiff chose not to do so here, over the course of more than three years of litigation. *See Oil Heat Inst. v. RMTS Assocs., LLC*, 4 A.D.3d 290, 294, 772 N.Y.S.2d 313, 316 (1st Dep't 2004) (holding that trial court improperly granted leave to amend, explaining that "[i]t is clear that plaintiffs made a deliberate tactical decision at the commencement of this litigation," and "[s]ince plaintiffs have failed to offer a reasonable

excuse for their delay, the court should not have granted them leave to serve an amended complaint").

The cases cited by Plaintiff do not apply the applicable legal standard for a motion for leave to amend on the eve of trial and following an extended delay.[5] The delay here is extraordinary and would substantially prejudice Sentinel. Prior to the First Department's decision, this case had been litigated through three-and-a-half years of extensive, hotly-contested litigation. All fact and expert discovery had been completed in this Court, including expert witnesses that Bernstein disclosed based on its theory that it was entitled to the entire value of legal fees from lost cases. Note of issue had been filed, and the case was on the eve of trial. Bernstein had offered no expert testimony or other evidence to support the new theory it now proposes in its post-final judgment motion for leave to amend. Sentinel's rebuttal experts were directed to responding to this theory. The relief Bernstein seeks, if granted, would require completely restarting this case, after more than three-and-a-half years of litigation, including re-deposing fact witnesses, and completely re-doing expert discovery, causing substantial prejudice to Sentinel. Leave to amend should therefore be denied. *See also Holliday v. Hudson Armored Car & Courier Serv.*, 301 A.D.2d 392, 399, 753 N.Y.S.2d 470, 477 (1st Dep't 2003) (leave to amend properly denied where

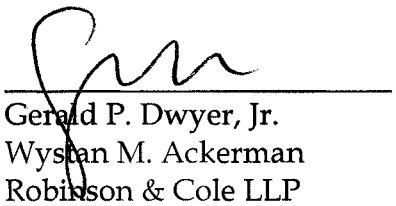
[5] Plaintiff's cases involve procedural postures far different from this case, and do not support Plaintiff's position that leave should be granted here. *See Jacobson v. McNeil Consumer & Specialty Pharm.*, 68 A.D.3d 652, 654, 891 N.Y.S.2d 387, 390 (1st Dep't 2009) (when motion for leave to amend was filed, "fact discovery was still being conducted, the deadline to complete expert depositions was eight months away, the deadline to file a note of issue was nine months away, and no trial date had yet been set"); *Rutz v. Kellum*, 144 A.D.2d 1017, 1018, 534 N.Y.S.2d 293, 294 (4th Dep't 1988) (leave to amend bill of particulars should have been granted where "defendants had actual notice of the additional claimed injury within a reasonably short time after the diagnosis"); *McFarland v. Michel*, 2 A.D.3d 1297, 1300, 770 N.Y.S.2d 544, 547 (4th Dep't 2003) (leave to amend to assert counterclaim should have been granted where "defendants established that the counterclaim had merit" with evidentiary support, and "[t]he motion was made within one week of the filing of the note of issue and certificate of readiness and was made within 1 1/2 years of the filing of the complaint," such that "there was no extended delay").

defendant's "discovery requests and trial preparation would have been drastically different" if amendment were sought earlier).

CONCLUSION

For all of the foregoing reasons, Plaintiff's post-final judgment motion for leave to amend the Complaint must be denied.

Dated: Hartford, Connecticut
March 19, 2018

By: 

Gerald P. Dwyer, Jr.
Wystan M. Ackerman
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Phone: (860) 275-8200
Fax: (860) 275-8299

Attorneys for Defendant
Sentinel Insurance Company, Limited

TO: **Lerner, Arnold & Winston, LLP**
Jonathan C. Lerner
475 Park Avenue South, 28th Floor
New York, New York 10016
Phone: (212) 686-4655
Fax: (212) 532-3301